Supreme Court, U.S.
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No. 98-942

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1999

WILLIAM FIORE
Petitioner

v.

GREGORY WHITE, Warden of the State Correctional Institution at Pittsburgh; THE ATTORNEY GENERAL OF THE COMMONWEALTH OF PENNSYLVANIA
Respondents

On Petition For Writ of Certiorari To The United States Courts Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Constitution compels the retroactive application of a state court criminal decision based on the construction of a state statute, so as to vacate a properly obtained state court conviction, made final long before the decision whose retroactive application is sought?

II. Whether this Court should consider the merits of a petition for certiorari where the Court of Appeals did not resolve the question of whether Petitioner had exhausted his claim or whether the state courts had adjudicated his claim on the merits?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Gregory White, Warden of the State Correctional Institution at Pittsburgh, and The Attorney General of the Commonwealth of Pennsylvania, respectfully request this Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, seeking review of the reversal of a writ of habeas corpus to William Fiore, a state prisoner in custody in Pennsylvania.

STATEMENT OF THE CASE

William Fiore and his co-defendant and former employee, Dave Scarpone, were convicted in 1986 of a violation of the provision of the Pennsylvania Solid Waste Management Act which requires that a proper permit be obtained for the storage, treatment, transportation and disposal

criminal cases. Scarpone took his appeal to the Pennsylvania Commonwealth Court, an intermediate appellate court with jurisdiction to hear appeals from criminal actions arising from the violation of regulatory statutes administered by a Commonwealth agency.

Each litigant obtained a different result. Fiore's judgment of sentence was affirmed by Superior Court based on the opinion of the trial court. The Pennsylvania Supreme Court denied Fiore's petition for discretionary review and Fiore's conviction became final on direct appeal. More than a year after Fiore had exhausted his direct appeal, Commonwealth Court reversed Scarpone's conviction. The Pennsylvania Supreme Court granted the Commonwealth's petition for allowance of appeal and affirmed the reversal. The Supreme Court held, that as a matter of statutory construction, "[T]he statutory language here cannot be stretched to include criminal activities which clearly fall under another statutory section or subsection." *Commonwealth v. Scarpone*, 535 Pa. 273, 279, 634 A. 2d 1109,1112 (1993). The decision stood silent as to its retroactive application.

Fiore made two unsuccessful attempts in state court to obtain extraordinary review of his already exhausted direct appeal. While Scarpone's appeal was pending before the Pennsylvania Supreme Court, Fiore filed an Application for Emergency Relief, asking the Court to consider the merits of his conviction when the Court considered *Scarpone*. To accomplish this, Fiore asked the Pennsylvania Supreme Court to exercise its King's Bench powers, 42 Pa. Cons. Stat. Ann. §726 (West 1981), which permit the Court to take jurisdiction of any matter pending before any court of the Commonwealth and "enter a final order or otherwise cause right and justice to be done." When Fiore requested this extraordinary remedy, he had no matter pending before any court in the Commonwealth. The application was denied without comment.

Fiore filed a second Application for Emergency Relief after the Pennsylvania Supreme Court upheld the reversal of Scarpone's conviction. Although Fiore had no matter pending before any court in the Commonwealth, he again asked the Pennsylvania Supreme Court to invokes its King's Bench powers and give him the retroactive application of *Commonwealth v. Scarpone,* 535 Pa. 273, 634 A.2d 1109 (1993).This application was denied without comment.

Fiore then sought to vacate his conviction through the mechanism of post conviction relief, once again requesting retroactive application of *Scarpone*. The trial court denied relief. The Superior Court affirmed the denial in a written opinion which explained Pennsylvania's law with respect to retroactive application of new appellate court rulings to cases on collateral review. The Pennsylvania Supreme Court denied Fiore's petition for allowance of appeal.

Finally, Fiore sought a writ of habeas corpus from the district court, asserting that he was in custody for conduct which the Pennsylvania Supreme Court had determined did not constitute a crime and that the Pennsylvania courts had denied him due process and equal protection of law by refusing to grant him the benefit of the Pennsylvania Supreme Court decision in *Scarpone*. The United States District Court for the Western District of Pennsylvania held that Fiore should obtain relief through the retroactive application of *Scarpone* and granted a writ of habeas corpus. Respondents, through the Pennsylvania Office of Attorney General, appealed to the United States Court of Appeals for the Third Circuit. The Court of Appeals found that neither the Due Process Clause nor the Equal Protection Clause mandates the retroactive application of *Scarpone* and reversed the district court's grant of a writ of habeas corpus

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Court Of Appeals Properly Considered And Rejected Petitioner's Due Process Clause Claim.

Fiore is himself in error when he contends that the Court of Appeals "erred in framing its analysis of petitioner's due process claim as simply a request that petitioner be afforded retroactive application of the Pennsylvania Supreme Court's decision in *Commonwealth.v.Scarpone*, 535 Pa. 273, 634 A. 2d 1109 (1993)." Pet. 11. Fiore characterizes his "due process claim . . . [as] a straightforward contention that the trial court had no authority to punish him because the uncontradicted evidence of record does not establish each essential element of the crime upon which he is convicted." Pet. 11-12.

Fiore sought a writ of habeas corpus on the allegations that (1) he was in custody for conduct which the Pennsylvania Supreme Court had determined was not a crime and (2) that the Pennsylvania courts had denied him due process and equal protection of law by refusing to grant him the benefit of the Supreme Court decision in *Scarpone*. Petition for Writ of Habeas Corpus, Paragraph 12(a), p. 3. The first claim implicitly references *Scarpone* ("in custody for conduct which the Pennsylvania Supreme Court had determined was not a crime"). The second claim explicitly references *Scarpone*.

As Fiore styled his claims in the district court, the matter plainly was a request for the retroactive application of *Scarpone*. The United States District Court for the Western District of Pennsylvania recast Fiore's first claim as one grounded solely in a claim of insufficient evidence. App. A-6, citing Report of Magistrate Judge at 11-12. By so doing, the

District Court erroneously removed the issue of the retroactive application of *Scarpone* which Fiore himself raised.

Despite the error of the Magistrate Judge in recasting Fiore's first claim for relief, the Court of Appeals did not err in its analysis. The Court of Appeals observed that Fiore based his eligibility for federal habeas relief on the claim that he had been denied due process of law, by authority of *In Re Winship*, 397 U.S. 358 (1970)(Due Process Clause requires proof beyond reasonable doubt of every fact necessary to constitute crime charged). The Court of Appeals rejected Fiore's due process claim.

> Fiore's argument would have force had *Scarpone* been the law in Pennsylvania at the time of his conviction. However, *Scarpone* was decided after Fiore's conviction became final, and the Pennsylvania courts refused to apply the decision in Fiore's case based on state retroactivity principles. *See Commonwealth v. Fiore*, 665 A. 2d 1185, 1193 (Pa. Super. Ct. 1995) Since "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions," *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991), Fiore is entitled to relief only if federal law requires retroactive application of *Scarpone*.

App.A-7 through A-8. Plainly, the Court of Appeals considered Fiore's Due Process Clause claim, and rejected it. Such a result does not merit consideration by this Court.

It should also be noted that Fiore simplifies, and thus misstates, the Commonwealth's theory of prosecution, *viz.* "The Commonwealth does not dispute, and in fact agrees, that Petitioner Fiore possessed a DER-authorized permit to operate his facility at all relevant times." Pet. 13, citing to App. A-3,

It should also be noted that Fiore simplifies, and thus misstates, the Commonwealth's theory of prosecution, *viz.* "The Commonwealth does not dispute, and in fact agrees, that Petitioner Fiore possessed a DER-authorized permit to operate his facility at all relevant times." Pet. 13, citing to App. A-3, App. E-2 through E-4. The Court of Appeals properly stated the prosecution's theory: "Although the state did not dispute the fact that Fiore had obtained a permit from the DER. . .the state proceeded on the theory that Fiore and Scarpone so altered the monitoring system and so significantly departed from the terms of the permit that the operation of the hazardous waste facility thereafter was an unpermitted operation." App. A-3

II. The Federal Constitution Does Not Require That Pennsylvania Give Retroactive Application To A State Court Criminal Decision Construing State Law.

At its core, the instant petition for a writ of certiorari seeks to compel the retroactive application of a state court decision, grounded in state criminal law and state principles of statutory construction, so as to vacate a properly obtained state court conviction, also grounded in state law, and made final long before the decision whose retroactive application is sought. No provision of the federal constitution requires such a result.

Controlling law is plain. The grant of a writ of habeas corpus obtains only when there has been a violation of the Constitution, laws or treaties of the United States. 28 U.S.C.A §2254(a)(West 1994)."[T]he federal constitution has no voice upon the subject" of retroactivity. *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358,364 (1932).*See Linkletter v. Walker*, 381 U.S. 618 (1965); *Solem v. Stumes*,

decisions of its highest court, though later overruled, are law none the less for intermediate transactions." *Great Northern Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358,364 (1932)

In arguing for the retroactive application of *Scarpone*, Fiore presents no question of constitutional dimension. Accordingly, there are no grounds to grant the petition.

III. Unresolved Issues Of Exhaustion And The Limited Scope Of Relief Sought Render This Petition Unsuitable For Consideration By The Court.

The Court of Appeals noted that Fiore is subject to the additional requirements of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §104, 110 Stat. 1214, 1218-19. The Court of Appeals was certain that Fiore could not succeed on the merits, and so wrote, "we need not decide whether Fiore exhausted his claim, *id.* §104(b), or whether the state courts adjudicated his claim on the merits. *id.* at §104(d)." App. A-7, n.3

"An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies." 28 U.S.C. §2254(b)(2)(1998). A writ of habeas corpus may not obtain on behalf of a state prisoner unless the applicant has exhausted available state remedies. 28 U.S. C. §2254(b)(1)(A) (1998).

The Commonwealth has not waived the issue of exhaustion, having raised the issue in both the District Court and the Court of Appeals. With the question of exhaustion of remedies left unresolved, review of the merits of the case would be improvident.

Finally, the petition is unsuitable for consideration on the merits because a resolution in favor of the Petitioner would

and the Court of Appeals. With the question of exhaustion of remedies left unresolved, review of the merits of the case would be improvident.

Finally, the petition is unsuitable for consideration on the merits because a resolution in favor of the Petitioner would have no broad ramifications. The Commonwealth is now bound to follow the law of *Scarpone*. The relief sought would affect only the petitioner.

CONCLUSION

William Fiore is not, as he asserts, "an indisputedly innocent man. . . incarcerated for a crime the Commonwealth effectively concedes it could not prove." He stands convicted under a theory of prosecution affirmed on direct appeal. The Commonwealth is under no constitutional obligation to grant retroactive application of a decision grounded in state criminal law and principles of statutory construction.

Respondents request this Honorable Court to deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit, both because the Court of Appeals properly reversed the grant of a writ of habeas corpus

and because the underlying case presents unresolved issues of exhaustion of state remedies.

Respectfully submitted

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